B.C. A. L. P. M. Bte 164

SEPARATE

In the Privy Council

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS OF THE CITY OF OTTAWA

v.

R. MACKELL AND OTHERS.

Delivered by

THE LORD CHANCELLOR.

In the Privy Council

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS OF THE CITY OF OTTAWA AND OTHERS

v.

THE CORPORATION OF THE CITY OF OTTAWA AND OTHERS.

SAME

v.

THE QUEBEC BANK AND OTHERS.

Delivered by

THE LORD CHANCELLOR.

Privy Council Appeal No. 59 of 1914.

The Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa - - - - - - - - - *Appellants,*

v.

R. Mackell and Others - - - - - - - - - *Respondents.*

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* THE LORD CHANCELLOR.]

This appeal raises an important question as to the validity of a Circular of Instructions issued by the Department of Education for the Province of Ontario on the 17th August, 1913.

The primary schools within the Province are for the purposes of this circular separated into two divisions: public schools and separate schools, the latter, with which alone this appeal is concerned, being denominational schools, established, supported, and managed under certain statutory provisions to which reference will be made. The population of the province is, and has always been, composed both of English- and of French-speaking inhabitants, and each of the two classes of schools is attended by children who speak, some one language some the other, while some, again, have the good fortune to speak both, so that distinction in language does not and cannot be made to follow the distinction in the schools themselves. The Circular in some of its clauses deals with all schools, but its heading refers only to English-French schools, which are defined as being those schools, whether separate or public, where French is a language of instruction or communication, which have been marked out by the Minister for Inspection as provided in the Circular.

The object of the Circular is to restrict the use of French in these schools, and to this restriction the appellants, who are the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa, assert that they are not obliged to submit. The respondents, who are supporters of the same Roman Catholic schools, desire to maintain the Circular of Instructions in its integrity, and upon the appellants' refusal to abide by its terms the respondents instituted against them the proceedings out of which this appeal has arisen, asking, among other things, a mandatory order enforcing against the appellants obedience to the Circular.

The Supreme Court of Ontario granted the injunction that was sought and their judgment was affirmed by the unanimous opinion of the Judges of the Appellate Division of the Supreme Court.

The appellants' defence of their action rests in substance upon the contention that the instructions were, and are, wholly unauthorised and unwarranted and beyond the powers of the Minister of Education, because they were contrary to, and in violation of, the British North America Act of 1867.

In order to confer legislative authority upon the instructions an Act of the Province of Ontario (5 Geo. V., cap. 45) has been passed during the litigation, declaring that the regulations imposed were duly made and approved under the authority of the Department of Education and became blinding according to the terms of the provisions on the appellants and the schools under their control, and containing consequential provisions. It it obvious that the validity of the Statute depends upon considerations similar to those involved in determining the validity of the instructions, but this Statute is the subject of another proceeding, and the present appeal is confined to the question whether the Minister of Education had power to issue the circular. The number of schools which are affected by the dispute is considerable, for of 192 Roman Catholic schools under the charge of the appellants, 116 have been designated English-French schools.

The material sections in the British North America Act upon which the appellants rely are sections 91, 92, and 93. Section 91 authorises the Parliament of Canada to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. Section 92 enumerates the classes of subjects in relation to which the Legislatures of the Provinces may exclusively make laws, and includes therein generally all matters of a merely local or private nature in the province. Section 93 deals specifically with education, and enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to the provisions therein contained. It appears, therefore, that the subject of education is excluded from the powers conferred on the Parliament of Canada, and is placed wholly within the competence of the Provincial Legislatures, who again are subject to limitations expressed in four provisions. Provision (1) is in these terms:—

"Nothing in any such law shall prejudicially affect any right "or privilege with respect to denominational schools which any "class of person have by law in the province at the Union."

Provision (3) contains an important safeguard, which gives an appeal to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education. Provision (4) provides machinery for making the decision of the Governor-General in Council effective. If a Provincial Law which seems to the Governor-General in Council requisite for the due execution of the provisions of the section is not made, or any decision of the Governor-General in Council is not duly executed by the proper provincial authority, then, and in every such case, and so far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under the section. These provisions contain a procedure of great value to the Protestant or Roman Catholic minority in relation to education. They do not affect or diminish whatever remedy the appellants have under provision (1), and cannot operate to give the Legislature of Ontario authority to legislate in matters specially excepted from their authority.

Accordingly it would require an Act of the Imperial Legislature prejudicially to affect any right or privilege reserved under provision (1), and if the regulations which are impeached do prejudicially affect any such right or privilege, to that extent they are not binding on the appellants.

There is no question that the English-French Roman Catholic Separate Schools in Ottawa are Denominational Schools to which the provision applies, and it has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practice instruction or privilege of a voluntary character which at the date of passing of the Act might be in operation (*City of Winnipeg* v. *Barrett*, 1892, A.C. 445).

Further, the class of persons to whom the right or privilege is reserved must, in their Lordships' opinion, be a class of persons determined according to religious belief, and not according to race

or language. In relation to denominational teaching, Roman Catholics together form within the meaning of the section a class of persons, and that class cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held. The appellants and the respondents, therefore, are members of the same class, but this fact does not affect the appellants' position on their appeal, for their case is that even to the class so determined there was preserved by the Statute and vested in them as trustees rights or privileges which include the right of deciding as to the language to be used as a means of instruction; and the question, therefore, that arises, is, What were the rights and privileges that were protected by the Act, and were they invaded by the Circular according to its true meaning?

Now it appears that at the date of the passage of the British North America Act of 1867, a Statute was in operation in Upper Canada by which certain legal rights and privileges were conferred on Roman Catholics in Upper Canada in respect to separate schools, and so far as the facts of this case are concerned this was the only source from which the rights and privileges could have proceeded.

This Act enabled any number of people, not less than five and being Roman Catholics, to convene a public meeting of persons who desire to establish a separate school for Roman Catholics, and for the election of trustees for the management of such schools; by section 7 it is enacted that the trustees of such schools should form a body corporate under the Statute, should have power to impose, levy, and collect school rates or subscriptions from persons sending children to, or subscribing towards the support of, such schools, and should have "all the powers in respect of separate schools that the trustees of common schools have and possess under the provisions of the Act relating to common schools." A special clause also related to the appointment of teachers, who, before the passing of this Statute, had been arbitrarily appointed by Boards of Trustees, and this power was regulated and restricted by section 13, which provided that the teachers of the separate schools should be subject to the same examinations, and receive their certificate of qualification in the same manner as

common schools teachers; while section 26 provided that the schools should be subject to inspection, and should be subject also "to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

In order, therefore, to ascertain the true extent and limit of the powers conferred by this Statute, it is necessary to see what were the powers enjoyed by trustees of the common schools. These are to be found in another Statute of Upper Canada, 22 Vict., cap. 64, known as the Common Schools Act of 1859. This Statute conferred upon trustees for common schools certain powers, the most important of which are to be found collected under several heads in section 79. A mere glance at this section will show that such powers are undoubtedly wide. They include under sub-section 7 power to acquire school sites and premises, and to do what may seem right for procuring text-books and establishing school libraries, while sub-section 8 places in the hands of the trustees the determination of "the kind and description of schools to be established", the teachers to be employed, and generally the terms of their employment. These powers are, however, to some extent limited by sub-sections 15 and 16, the first of which in effect requires that the text-books should be a uniform series of authorised text-books, while the latter compels the trustees to see that all the schools under their charge are conducted according to the authorised regulations.

Counsel for the appellants naturally place great reliance upon these provisions, and in the wider aspect of their argument they contend that "the kind of school" that the trustees are authorised to provide is a school where education is to be given in such language as the trustees think fit.

They urge that it was a right or privilege possessed with respect to denominational schools in 1867 in determining the number and kind of schools to say within what limits the French language is to be used; for, according to their contention, "kind of school" means a school where the French language, under the direction of trustees, may be used as a medium of instruction on terms not less unfavourable than the use of English. Their Lordships are unable

to agree with this view. The "kind" of schools referred to in sub-head 8 of section 73 is, in their opinion, the grade or character of school, for example, "a girls' school," "a boys' school," or "an infants' school," and a "kind" of school, within the meaning of that sub-head, is not a school where any special language is in common use.

The schools must be conducted in accordance with the regulations, and their Lordships can find nothing in the Statute to take away from the authority that had power to issue regulations the power of directing in what language education is to be given. If, therefore, the trustees of the common schools would be found to obey a regulation which directed that education should, subject to certain restrictions, be given in either English or French, the trustees of the separate schools would also be bound to obey a regulation of the same character affecting their school, provided that it does not interfere with a right or privilege reserved under the Act of 1867, i.e, a right or privilege attached to denominational teaching.

The objections to the instructions which were urged before their Lordships, however, were not chiefly based on the allegation that they prejudicially affected in any special manner denominational teaching, but on the wider ground. Their Lordships appreciate the affection which the French-speaking residents in Ottawa feel for the French language; but it must not be forgotten that, although a majority of the supporters of the English-French separate schools in Ottawa are of French origin, there are other supporters to whom French is not the natural language. This fact has no doubt caused great difficulty in adjusting fairly as between the different inhabitants the natural rivalry as to the languages to be used in the education of the children, and the care with which this difficulty has been considered, is evidenced in the terms of a valuable report which is printed in the record, and to which their Lordships would direct attention:—

"As was stated in our former report, while all classes of the "French people are not only willing but desirous that their chil- "dren should learn the English language, they at the same time "wish them to retain the use of their own language, and there is

" no reason why they should not do so. To possess the knowledge " of both languages is an advantage to them. And the use of the " English language instead of their own, if such a change should " ever take place, must be brought about by the operation of the " same influences which are making it all over this continent the " language of other nationalities as tenacious of their native ton- " gue as the French. It is a change that cannot be forced. To " attempt to deprive a people of the use of their native tongue " would be as unwise as it would be unjust, even if it were possi- " ble. In the British Empire there are people of many languages. " The use of these does not affect the loyalty of the people to the " Crown, and the English language remains the language of the " Empire. The object of these schools is to make better scholars " of the rising generation of French children, and to enable them " to do better for themselves by teaching them English, while " leaving them free to make such use of their own language as " they please."

It therefore becomes necessary to examine closely the terms of the Circular in order to ascertain the nature and extent of the restrictions it imposes. Unfortunately it is couched in obscure language, and it is not easy to ascertain its true effect. It opens with a definition of English-French schools, and it was argued on behalf of the appellants that even this definition was not within the power of the Department; but there is no weight in this objection, provided that the selected schools are so dealt with as not to impeach any legal right or privilege of the appellants. The second paragraph of the Circular is important. The regulations and courses of study prescribed for the public schools, which are not inconsistent with the provisions of the Circular, are applied to the English-French schools, with the following modifications:—

" The provision for religious instruction and exercises in pu- " blic schools shall not apply to separate schools, and separate " school boards may substitute the Canadian Catholic readers " for the Ontario public school readers."

These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruc-

tion in the Common Schools Act and the Separate Schools Act. The only reference to religious instruction to which their Lordships were referred in these Statutes is section 129 of the former Statute. This section provides that no persons shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian, and this provision preserves these rights. Indeed this clause, in their Lordships' opinion, indicates that the whole course of religious teaching in the separate schools is outside the operation of the Circular, for the Circular applies to public schools and separate schools alike and impartially, and if it contained provisions with regard to religious instruction in the public schools, by virtue of this clause these provisions would not apply to the separate schools; throughout the whole of the Circular, however, there is nothing whatever to indicate that it is intended to have any application, excepting it may be in the case of public schools, to anything but secular teaching, and it is in this connection that clause 3 must be read. This is the paragraph which regulates the use of French as the language of instruction and communication, and it is against these provisions that the complaint of the appellants is mainly directed. The paragraph refers equally to public and separate schools, and directs that modifications shall be made in the course of study in both classes of schools, subject to the direction and approval of the Chief Inspector. In the case of French-speaking pupils, French, where necessary, may be used as the language of instruction and communication, but not beyond Form I, except on the approval of the Chief Inspector in the case of pupils beyond Form I, who are unable to speak and understand the English language. There are further provisions for a special course in English for French-speaking pupils, and for French as a subject of study in public and separate schools.

Mr. Belcourt urged that so to regulate the use of the French language in the separate Roman Catholic schools in Ottawa constituted an interference, and is in some way inconsistent with a natural right vested in the French-speaking population; but unless this right was one of those reserved by the Act of 1867, such inter-

ference could not be resisted, and their Lordships have already expressed the view that people joined together by the union of language and not by the ties of faith do not form a class of persons within the meaning of the Act. If the other opinion were adopted, there appears to be no reason why a similar claim should not be made on behalf of the English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa. In this connection it is worthy of notice that the only section in the British North America Act, 1867, which relates to the use of the English and French languages (sec. 133), does not relate to education, and is directed to an entirely different subject-matter. It authorises the use of either the English or French language in debates in the Houses of Parliament, in Canada, and the Houses of Legislature in Quebec, and by any person, or in any pleading or process in, or issuing from, any Court of Canada, and in and from all or any of the Courts of Quebec. If any inference is to be drawn from this section, it would not be in favour of the contention of the appellants.

Further objections that are taken to the Circular depend upon these considerations, that it interferes with the right to manage which the trustees possess, and that it further infringes a right on the part of the trustees to appoint teachers whose certificates are provided by a Board of whom the trustees can appoint one.

In their Lordships' view, there is no substance in either of these contentions. The right to manage does not involve the right of determining the language to be used in the schools. Indeed, the right to manage must be subject to the regulations under which all the schools must be carried on; and there is nothing in the Act to negative the view that those regulations might include the provisions to which the appellants object. If, therefore, the regulation as to which the trustees of the common schools were bound to carry on the class of school committee to their charge did, in fact, under the Act of 1859, enable directions to be given as to the medium of instruction, the power possessed by the trustees of the separate schools would have been subject to the same limitation, and the question as to interference with the powers of management does not arise as an independent question.

So far as the teachers are concerned the words of Subsection 8 of Section 79 empower the trustees to determine the teacher or teachers; but this merely means that they are to be determined out of the number who are duly qualified, and it is for the Board of Education to impose what conditions they think fit as to the necessary qualification of such a teacher. Under the Statute of 1859 the Body for examining and giving certificates of qualification for the teacher was constituted by three members of the Board of Public Instruction, including a local superintendent of the schools; and it is argued that, under the power of appointing the local superintendent—a power conferred on the trustees—the provisions in the Circular, which impose as a necessary condition of qualification of the teachers that they must possess a knowledge of the English language, interfered with the trustees' right in this respect. To accede to this argument would involve the removal of the condition as to the necessary qualification of the teachers from the Board of Education. This might be a serious matter for the cause of education in the Province of Ontario; but there is no need to consider that the Statute compels this view. Even assuming that the provision of Section 96 as to the granting of certificates to teachers might be still revived; yet even then there is nothing to prevent the establishment of special conditions as conditions with which the teachers must comply before any such certificate can be given.

In the result, their Lordships are of opinion that, on the construction of the Acts and documents before them, the regulations impeached were duly made and approved under the authority of the Department of Education, and became binding according to the terms of those provisions on the appellants and the schools under their control, and they will humbly advise His Majesty to dismiss this appeal.

The appellants will pay the costs.

[L. S.]

AT THE COURT AT BUCKINGHAM PALACE.

The 6th day of November 1916

Present

THE KING'S MOST EXCELLENT MAJESTY

Lord President — **Lord Steward**
Earl of Desart — **Lord Colebrooke.**

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 2nd day of November 1916 in the words following viz.:—

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Appellate Division of the Supreme Court of Ontario between the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa Appellants and R. Mackell H. F. Sims James Brennan M. J. O'Neil F. D. Henderson M. J. Ryder and John F. Lanigan suing on behalf of themselves and all other Supporters of the Roman Catholic Separate Schools for the City of Ottawa and Your Majesty's Attorney-General for the Province of Ontario Respondents (Privy Council Appeal No. 59 of 1916) and likewise a humble petition of the Appellants setting forth that on the 20th April 1914 the Respondents other than Your Majesty's Attorney-General for the Province of Ontario commenced an Action in the High Court Division of the Supreme Court against the Appellants praying for (amongst other things) a Mandatory Order against the Appellants to conform to and enforce in the Schools under their control certain Regulations of the Department of Education for the Province of Ontario and more especially Regulation

No. XVII of August 1913: that the High Court Division of the Supreme Court on the 17th December 1914 gave judgment in favour of the Respondents: that the Appellants appealed to the Appellate Division of the Supreme Court and that Court on the 12th July 1915 gave judgment dismissing the Appeal: that the Appellants obtained leave to appeal to Your Majesty in Council: And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Judgment of the Appellate Division of the Supreme Court dated the 12th July 1915 may be reversed altered or varied or for further or other relief in the premises:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the said humble Petition and Appeal into consideration and having heard Counsel on behalf of all the parties their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and the Judgment of the Appellate Division of the Supreme Court of Ontario dated the 12th day of July 1915 affirmed.

"And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Appellants to the Respondents their costs of this Appeal incurred in the said Supreme Court and the sum of £320 19s. 0d. for their costs thereof incurred in England."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

ALMERIC FITZROY.

Privy Council Appeals Nos. 62 and 63 of 1916.

The Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa and others - - *Appellants,*

v.

The Corporation of the City of Ottawa and others - - - - - - - - - *Respondents,*

Same - - - - - - - - - - - - - *Appellants,*

v.

The Quebec Bank and others - - - - - *Respondents.*

Consolidated Appeals

FROM

THE SUPREME COURT ON ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* THE LORD CHANCELLOR.]

The question raised in these consolidated appeals is whether section (3) of 5 George V, c. 45 (1915), Ontario, is valid and within the competency of the provincial legislature. The appellants contend that this section prejudicially affects certains rights and privileges with respect to denominational schools reserved under provision (1) of section 93 of "The British North America Act, 1867."

The preamble of the Act of 1915 recites that an action was then pending in the Supreme Courts of Ontario between R. Mackell and others and the appellants. This action has now been finally decided adversely to the appellants. Their Lordships see no reason to anticipate that this judgment will not be accepted and obeyed. There is a further recital that the appellants have failed to open the schools under their charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and have threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same. So far as this appeal is concerned, the accuracy of these recitals was not questioned by the counsel for the appellants. Section (1) of the Act does not come into question in this appeal; section (2) is a declaration of the duties of the appellants.

Section (3) is as follows:—

"If, in the opinion of the Minister of Education, the said Board fails to comply with any of the provisions of this Act. he shall have power with the approval of the Lieutenant-Governor in Council—

"(*a.*) To appoint a commission of not less than three nor more than seven persons.

"(*b.*) To vest in and confer upon any commission so appointed all or any of the powers possessed by the Board under statute or otherwise, including the right to deal with and administer the rights, properties, and assets of the Board, and all such other powers as he may think proper and expedient to carry out the object and intent of this Act.

"(*c.*) To suspend or withdraw all or any part of the rights, powers, and privileges of the Board, and whenever he

may [illegible] desirable to restore the whole or any part of the same, and to revest the same in the Board.

"(*d.*) [illegible]e make such use or disposition of any legislative grant that would be payable to the said Board on the warrant of any inspector for the use of the said schools, or any of them, as the Minister may in writing direct."

The Acting Minister of Education expressed the opinion that the trustees had failed, and were failing to comply with the provisions of the Act, and submitted the appointment of a Commission for the approval of the Lieutenant-Governor in Council. The respondent Commission was duly appointed under an Order in Council on the 25th July, 1915.

The powers conferred on the Minister of Education in sub-sections (*b*) and (*c*) of section 3 are expressed in very wide terms. At the instance of the Minister, with the approval of the Lieutenant-Governor in Council, all or any part of the rights, powers, and privileges of the appellant Board may be suspended or withdrawn without limitation in time, and only subject to restoration at the discretion of the Minister. The powers withdrawn from the appellant Board may be vested in and conferred upon an appointed Commission, a nominated body, in the selection of which the ratepaying supporters of the Roman Catholic Separate Schools have no voice. There is no exception to the universality of the extent to which all the rights, powers, and privileges of the appellant Board may be suspended or withdrawn and vested in and conferred upon this nominated body. Is this legislation consistent with provision (1) of section 93 of "The British North America Act, 1867"? Section 93 enacts that in and for each province the Legislature may exclusively make laws in relation to education, subject and according to certain specified provisions. This section has been recently under the consideration of their Lordships in the case of the appellant Board and R. Mackell and others. The effect of the section and of sections 91 and 92 is to give an exclusive jurisdiction to the Legislature of each province to make laws in reference to education subject to the specified provisions. The Parliament of Canada has no jurisdiction in relation to education, except under the conditions in

provision (4), which are not in question in this appeal. The rights or privileges reserved in provision (1) cannot be prejudicially affected without an Act of the Imperial Legislature.

There is no question that the impeached section of the Act of 1915 does authorise the Minister of Education to suspend or withdraw legal rights and privileges with respect to denominational schools. The case of the respondent Commission is that the appellant Board does not come within the category of "a class of person" and that no right or privilege with respect to denominational schools, which the appellant Board had by law in the province at the union, has been prejudicially affected. It was argued that the protection given by provision (1) related to rights or privileges possessed by all the adherents of the Roman Catholic schools in the province, and that the appellant Board only represented the minority of a larger class. The status of the appellant Board depends on the provisions contained in "The Separate Schools Act, 1863." Section (2) of that Act confers the right of electing trustees for the management of a separate school for Roman Catholics, not on all the adherents of Roman Catholic schools in the province, but on any number of persons, not less than five, being heads of families and freeholders, and householders, resident within any school section of any township, or corporate village, or town, or within any ward of any city or town, and being Roman Catholics. The right of electing managers is thus conferred on the supporters of a separate school or schools for Roman Catholics within one or other of the designated areas. In the present case the appellant Board are the elected trustees for the management of Roman Catholic Separate Schools within the city of Ottawa. They represent the supporters of the Roman Catholic Separate Schools within the area of the city, and as such elected trustees enjoy the right of management which was conferred under the Separate Schools Act, 1863. Apart therefore from any words of limitation or any implication to be drawn from the context, the appellant Board represent a section of the class of persons who are within the protection of provision (1). Their Lordships can find neither limiting words nor anything in the context which would imply that they are excluded from the benefit of the provision. They are not the less within the provision that

any other Board similarly constituted would have similar rights and privileges. They would be entitled to the protection of the provision, though they were the only Board of trustees in the province constituted under "The Separate Schools Act, 1863." But if the appellant Board represent people who come within the protection of provision (1), it is difficult to appreciate the argument that no legal right or privilege existing in the province at the union with respect to denominational schools has been prejudicially affected. It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn *in toto* for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of person affected by the withdrawal. Whether or not a different policy might have been preferable, either in the opinion of the provincial Legislature, or in that of the Courts, is not a relevant consideration. It was argued that no evidence on behalf of the appellant Board had been called to prove that the withdrawal of their rights, powers, and privileges, operated to their prejudice. In the opinion of their Lordships no such evidence was necessary.

For the purpose of these appeals it is unnecessary to say more. The decision depends on a question of construction. During the argument the Counsel for the respondent Commission pressed on their Lordships the difficulty of providing any adequate alternative in order to ensure the proper education of the children of Roman Catholic parents in the city of Ottawa. Their Lordships realize the great importance of this consideration, and there is no doubt that considerable temporary inconvenience must be involved if the appellant Board, as representatives of the supporters of the

Roman Catholic Separate Schools in Ottawa, fail to open the schools under their charge at the time appointed by law, and to provide and pay qualified teachers. It may be pointed out, however, that the decision in this appeal in no way affects the principle of compulsory free primary education in the province established under the School Law of 1850, and that if the appellant Board and their supporters fail to observe the duties incident to the rights and privileges created in their favour, the result is that the children of Roman Catholic parents are under obligation to attend the common schools, and thus lose the privileges intented to be reserved in their favour under provision (1) of section 93 of "The British North America Act, 1867." The history of this question is thus accurately summarized in the judgment of Meredith, C.J.O.:—

"The ground upon which was based the claim of the Roman Catholics to separate schools was the injustice of compelling them to contribute to the support of schools to which, owing to the character of the instruction given in them, they could not for conscientious reasons send their children because in their view it was essential to the welfare and proper education of their children that religious instruction according to the tenets of the Roman Catholic Church should be imparted to them as part of their educational training."

"This injustice, it was claimed, was greatly aggravated when, by the School Law of 1850, a system of compulsory free primary education in schools supported partly by Government grants, but mainly by taxation, to which all ratepayers were liable, was established."

Their Lordships do not anticipate that the appellants will fail to obey the law now that it has been finally determined. They cannot, however, assent to the proposition that the appellant Board are not liable to process if they refuse to perform their statutory obligations, or that in this respect they are in a different position from other Boards or bodies of trustees entrusted with the performance of public duties which they fail or decline to perform.

From what has been said it appears that in their Lordships' view the Act as framed is *ultra vires*, and accordingly liberty will

be reserved to the plaintiffs, should occ arise, to apply to the Supreme Court of Ontario for relief in accordance with this declaration, but their Lordships do not anticipate that it will be necessary for the plaintiffs to avail themselves of this right.

Their Lordships will humbly advise His Majesty that the appeals be allowed with costs to be paid by the respondent Commission here and below, and the respondent Commission will pay the costs of the Corporation of the City of Ottawa and the Quebec Bank.

[L. S.]

AT THE COURT AT BUCKINGHAM PALACE

The 6th day of November 1916

Present

THE KING'S MOST EXCELLENT MAJESTY

Lord President — **Lord Steward**
Earl of Desart — **Lord Colebrooke.**

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 2nd day of November 1916 in the words following viz.:—

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the Appellate Division of the Supreme Court of Ontario between the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa Appellants and the Corporation of the City of Ottawa the Ottawa Separate School Commission and Your Majesty's Attorney-General of Ontario Respondents (Privy Council Appeal No. 62 of 1916) and likewise a humble Petition of the Appellants setting forth that in September 1915 this Action was brought in the Supreme Court of Ontario by the Appellants against the Respondents the Corporation of the City of Ottawa and the Separate School Commission for an injunction to restrain the Corporation from paying to the Commission which had been constituted pursuant to the Act of the Legislature of Ontario 5 George V Chap. 45 and the latter from receiving from the Corporation the school rates collected or which might thereafter be collected by the Corporation for the Appellants: that the

Respondents the Corporation of the City of Ottawa did not contest the Action but submitted its right to the Supreme Court: that this Action was tried with another Action brought by the Appellants against the Quebec Bank and the Ottawa Separate School Commission and the Supreme Court on the 18th November 1915 gave judgment dismissing both Actions: that the Appellants appealed to the Appellate Division of the Supreme Court and that Court on the 3rd April 1916 gave judgment dismissing both Appeals: that the Appellants obtained leave to appeal to Your Majesty in Council: And humbly praying Your Majesty to take this Appeal into consideration and that the said Judgment of the Appellate Division of the Supreme Court of the 3rd April 1916 may be reversed altered or varied or for further or other relief in the premises:

"And whereas by virtue of the aforesaid Order in Council there was referred unto this Committee the Matter of an Appeal from the Appellate Division of the Supreme Court of Ontario between the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa Appellants and the Quebec Bank the Ottawa Separate School Commission and Your Majesty's Attorney-General of Ontario Respondents (Privy Council Appeal No 63 of 1916) and likewise a humble Petition of the Appellants setting forth that in September 1915 this Action was brought in the Supreme Court of Ontario by the Appellants against the Respondents the Quebec Bank and the Separate School Commission for an Injunction to restrain the Bank from paying to the Commission and the latter receiving from the Bank the monies belonging to the Appellants and then deposited with the Bank in the name of the Appellants: that the Respondents the Quebec Bank did not contest the Action but submitted its rights to the Supreme Court: that as already recited this Action was tried with the other Action brought by the Appellants against the Corporation of the City of Ottawa and the Ottawa Separate School Commission and reciting the various steps in the proceedings down to and including the Judgment of the Appellate Division of the Supreme Court of the 3rd April 1916: that the Appellants obtained leave to appeal to Your Majesty in Council: and humbly

praying Your Majesty in Council to take this Appeal into consideration and that the said Judgment of the Appellate Division of the Supreme Court of the 3rd April 1916 may be reversed altered or varied or for further or other relief in the premises:

"AND THE LORDS OF THE COMMITTEE having by their Order of the 3rd July 1916 ordered that the said Appeals (Privy Council Appeals Nos. 62 and 63 of 1916) should be consolidated and heard together on one Printed Case on behalf of the Appellants the Respondents the Ottawa Separate School Commission and the Attorney-General for the Province of Ontario respectively:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the said humble Petitions and Appeals into consideration and having heard Counsel on behalf of the Appellants the Respondents the Ottawa Separate School Commission and the Attorney-General of Ontario their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that these Appeals ought to be allowed (2) that the Judgments of the Appellate Division of the Supreme Court of Ontario both dated the 3rd day of April 1916 and the Judgments of the Supreme Court of Ontario both dated the 18th day of November 1915 ought to be set aside (3) that it ought to be declared that the Act of the Legislature of Ontario, 5 George V. Chap. 45 as framed is **ultra vires** of such Legislature (4)that liberty ought to be reserved to the Appellants to apply to the said Supreme Court for relief in accordance with this declaration and (5) that the Respondents the Ottawa Separate School Commission ought to pay the costs of the Appellants and the Respondents the Corporation of the City of Ottawa and the Quebec Bank incurred in the Courts below.

"And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Respondents the Ottawa Separate School Commission to the A pellants their costs of these Appeals incurred in the Appellate Division of the Supreme Court and the sum of £385 4s. 8d. for their costs thereof incurred in England to the Respondents the Corporation of the City of Ottawa their like costs of these

Appeals incurred in the said Appellate Division and the sum of £73 4s 6d. for their costs thereof incurred in England and to the Respondents the Quebec Bank their like costs of these Appeals incurred in the said Appellate Division and the sum of £73 4s. 6d. for their costs thereof incurred in England."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Lieutenant-Governor of the Province of Ontario for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

ALMERIC FITZROY.

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